THE HON'BLE SRI JUSTICE J. CHELAMESWAR

AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION NO. 26580 OF 2005

Date: 14-12-2005

Between:

The Commissioner, Alwal Municipality,

Rangareddy District ... Petitioner

And

N.Danaiah 54 others ..... Respondents

THE HON'BLE SRI JUSTICE J. CHELAMESWAR

AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION NO. 26580 OF 2005

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ORDER: (per Hon'ble Sri Justice J. Chelameswar)

Writ petition is filed with a prayer as follows:

"For the reasons stated in the accompanying affidavit, the petitioner herein therefore prays that this Hon'ble court may be pleased to issue a writ, order or direction particularly one in the nature of writ of Mandamus calling for the records relating to the impugned orders passed by the Hon'ble A.P. Administrative Tribunal passed in C.A.Nos. 1062/2004 in

O.A.No. 3606/2004 with C.M.As No. 108/2005 and 535/2005 and C.M.A.No. 84/2005 and C.A.No.1063/2004 in O.A.No.3973/2004 with V.M.As. 83/2005 and 536/2005, dt: 17.11.2005 and declare the same as illegal, arbitrary and further direct the Hon'ble A.P. Administrative Tribunal to decide the V.M.A. No. 535/2005 in O.A.No. 3606/2004 and V.M.A.No. 536/2005 in O.A.No. 3973/2004 and pass such other or further orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

The petitioner is the Commissioner of Alwal Municipaliy, which came into existence some time in the year 1987. Prior to that it was a panchayat. It must be stated here that the Alwal Municipality, for all the practical purposes, is part of the Hyderabad city, though it is not a part of the Municipal Corporation.

Respondents 1 to 51 are being engaged from 1984-85 onwards as N.M.R workers to attend various operations connected with the maintenance of sanitation of the areas comprised in the Municipality. The fact that all these people have been so engaged for such a log time is not in dispute. The above mentioned 51 respondents approached the erstwhile A.P. Administrative Tribunal in R.P.No. 3031 of 1989 seeking a direction to the respondents therein which included the present petitioner to regularize their services on the ground that they had been working for a period of five years as N.M.R workers. The respondents relied on certain G.Os issued by the Government from time to time as a basis for such claim. We deal with the G.Os separately at a later stage. The erstwhile Tribunal on a consideration of the merits of the case by its order dated 27.03.1989 directed as follows:

"Accordingly the respondents are directed to consider the case of the petitioners for absorption in regular service subject to their eligibility and seniority in terms of G.O.Ms.No.1320 dated 15.12.1981 and G.O.Ms.No. 300 dated 24.06.1985. In the mean time, the respondents are also directed to pay the petitioners wages at the rates applicable to regular employees holding corresponding posts and performing same or similar functions."

But the abovementioned direction was not implemented. Quite some time thereafter, the 51 respondents herein who were the applicants in the abovementioned O.A. approached this Court in W.P. No. 4966 of 1991 praying that there be direction to implement the judgment of the Tribunal referred to earlier. The matter was heard and disposed of by a learned Judge of this Court by an order dated 04.08.1992. The relevant portion of the order in the said Writ petition reads as follows:

“The learned Government Pleader appearing for respondents 2 and 3 states that the Government is actively seized of the matter and that appropriate; orders will be passed to facilitate the implementation of the order of the Tribunal dated 27.03.1989 without further loss of time.

In view of the fact that most of the ground work was already completed, the respondents are directed to complete the implementation of the order of the A.P. Administrative Tribunal dated 27.03.1989 made in R.P.No. 3031/89, within two months from the date of receipt of a copy of this order.

The writ petition is accordingly disposed of. No costs.”

The said order attained finality.

Notwithstanding the solemn statement made before this court by the State and the Commissioner of Alwal Municipality who is the writ petitioner herein that the issue of the regularization of the service of the respondents was actively under consideration by the appropriate authorities, none of the said appropriate authorities bothered to take any decision on the issue. In the background of the above mentioned facts, 51 respondents were once again compelled to knock the doors of the A.P. Administrative Tribunal, in substance, seeking the regularization of their service by way of a fresh O.A.No. 3606 of 2004 with a prayer as follows:

“In view of the facts stated in Para-6 above, the applicants pray that this Hon’ble Tribunal may be pleased to declare the action of the respondents in not regularizing the services of the applicants as directed by the erstwhile Tribunal in R.P.No. 3031/89 dated 27.03.1989 and as per the orders of the Hon’ble High Court in W.P.No. 4966 of 1991 dated 04.08.1992 in terms of G.O.Ms.No. 1320, MA, dated 15.12.1981 and G.O.Ms.No. 300, MA, dated 24.06.1985 from the date of completion of 5 years of service by creating supernumerary posts/regular posts in terms of G.O.Rt.1211, MA, dated 18.10.1989 and G.O.Ms.No. 1, MA, dated 01.01.1998 and pass such other order or orders as this Hon’ble Tribunal may deem fit and proper in the circumstances of the case. “

Along with the O.A. the applicants also had an interim direction. In view of the history of the litigation as mentioned earlier and in view of the fact that adequate time was given to the respondents therein to meet the challenge before them, since the respondents did not react to the order dated 27.07.2004, the tribunal passed an interim order as follows:

“The learned Standing counsel was given adequate time to get instructions in the matter. But no instructions are forthcoming so far. Admit. Notice returnable in four weeks.

In view of this, the respondents having released the periodical increments vide orders dated 14.10.1999 and having paid the same for the year, 2000, are directed to release the periodical increments to the applicant from 2001 onwards."

Having waited for a period of about six months, the respondents moved the A.P. Administrative Tribunal by way of Contempt Application No. 1062 of 2004 praying that the respondents 4 and 5 therein i.e., the Commissioner of Alwal Municipality and District Audit Officer of State Audit, Rangareddy District be summoned and punished for disobedience of the orders of the Tribunal. They are informed that the said Contempt Application was filed some time in November 2004. The Tribunal by its order dated 17.11.2005 issued notice to the three named respondents therein who are the petitioner and respondents 54 and 55 herein. On receipt of the said notice, the respondents woke up from their slumber and filed applications to vacate the interim orders granted earlier. As a matter of fact the said applications were filed on 25.07.2005. Almost a year after, the interim order was granted and eight months after, notice in the contempt application was ordered.

When the contempt application came up for hearing, it appears that a suggestion was made that their vacate miscellaneous applications be heard first. The Tribunal however declined the request of the petitioner and directed the appearance of the three named respondents who are the petitioner and respondents 54 and 55 herein to be present before the Tribunal on 15.12.2005 and hence the present writ petition.

The facts narrated so far demonstrate the pathetic state of affairs and the helplessness of the 51 respondents to the present petition who are supposed to be citizens of a country governed by a written constitution who have been knocking the doors of various constitutional fora seeking certain legal remedies which have been detailed earlier. In the proceedings before this Court in the earlier writ petition No. 4966 of 1991, the respondents made a solemn statement that their cases were being considered actively. Relying on the statement, this Court directed to complete the implementation of the order of the Tribunal dated 27-03-1989 made in RP No. 3031 of 1989 within two months from the date of the receipt of a copy of the said order. The petitioner and his collaborators simply choose to ignore the judicial orders and now complain that the Administrative Tribunal departed from the settled judicial practice of

considering their vacate applications before they one summoned to answer the charge of contempt.

In support of the submission, the learned Counsel for the petitioner Sri Polisetti Radhakrishna, relied upon a judgment of the Supreme Court reported in **State of J & K Vs. Mohd. Yaqoob Khan**. It was a case where the writ petition was filed before the Jammu & Kashmir High Court seeking the implementation of what was described as a decree between the parties to the writ petition. By an ex parte interim order, the High Court directed the respondents therein to supply 50% of the timber as agreed (as per the decree). During the pendency of the writ petition, complaining that the said interim order had not been complied with, a contempt application was moved before the High Court. Challenging the correctness of the contempt proceedings, the respondents in the writ petition approached the Supreme Court. Dealing with the said matter, the Supreme Court held at para 6 and 7 of the judgment as follows:

"We do not agree. The scope of a contempt proceedings is very different from that of the pending main case yet to be heard and disposed of (in future). Besides, the respondents in a pending case are at a disadvantage if they are called upon to meet the merits of the claim in a contempt proceedings at the risk of being punished. It is, therefore, not right to suggest that it should be assumed that the initial order of stay got confirmed by the subsequent orders passed in the contempt matter.

We, therefore, hold that the High Court should have first taken up the stay matter without any threat to the respondents in the writ case of being punished for contempt. Only after disposing it of, the other case should have been taken up. It is further significant to note that the respondents before the High Court were raising a serious objection disputing the claim of the writ petitioner. Therefore, an order in the nature of mandatory direction could not have been justified unless the court was in a position to consider the objections and record a finding, prima facie in nature, in favour of the writ petitioner. Besides challenging the claim on merits, the respondent was entitled to raise a plea of non-maintainability of a writ application filed; for the purpose of executing a decree. It appears that at an earlier stage the decree in question was actually put in execution when the parties are said to have entered into a compromise. According to the case of the State the entire liability under the decree (read with the compromise) has already been discharged. The dispute, therefore, will be covered by Section 47 of the Code of Civil Procedure. It will be a serious question to consider whether in these circumstances the writ petitioner was entitled to maintain his application under Section 226 of the Constitution at all. We do not want to decide any of these controversies between the parties at; this stage except holding that the orders passed in the contempt proceedings were not justified, being premature, and must, therefore, be entirely ignored. The High Court should first take up the stay matter in the writ case, and dispose it of by an appropriate order. Only thereafter it shall proceed to consider whether the State and its authorities could be accused of being guilty of having committed contempt of

court."

In our view, there cannot be any quarrel with the principle if only the petitioner herein had any valid objection for not implementing the interim order passed by the Tribunal in the instant case more particularly, when such an interim order came to be passed in the background of a final decision of this Court in W.P.No. 4966 of 1991.

However to satisfy the conscious of the Court whether any failure of justice is likely to be caused by virtue of the order impugned in the writ petition, we called upon the learned Counsel for the petitioner to state whether there could be any possible defence for the petitioner.

Learned Counsel for the petitioner argued that there are no sanctioned posts for regularizing the services of the respondents 1 to 51 herein in the Municipality because the Government has not created any such sanctioned posts and in the absence of the sanctioned posts the directions of this Court in W.P.No. 4966 of 1991 could not be implemented for regularizing the services of the above mentioned respondents.

We are of the opinion the defence is wholly misconceived and without any basis of law.

Petitioner herein is the Commissioner of a statutory Corporation called the Alwal Municipality. The said Corporation is governed by the provisions of the A.P. Municipalities Act 1965 (for short 'the Act'). Under the provisions of the said Act, every "municipality" defined under expression 2 sub-section 22 shall have the council constituted under Section 5 of the said Act and by virtue of the declaration under Section 6 of the Act, such a Municipality declared to be body corporate with perpetual succession and with various powers and obligations including the power to enter into contracts and doing all things necessary for the purpose of the Act. Various functions and obligations are entrusted to this local body called Municipality. Obviously for discharging those statutory functions and obligations, these Municipalities are required to have necessary man power for discharging those obligations and duties. Under Section 73 of the Act, the Municipalities are empowered to fix or alter the number of the offices and employees of the Municipal Council and their salaries and other matters. In substance, Section 72 elaborates the power of entering into

contracts vested in the Municipality in the sphere of employment of the personnel. Sub-section 3 of Section 73 authorises the State to regulate the exercise of the power of the Municipality vested under Section 73 of sub-section 1. The appointing authority of the various classes of employees, as contemplated under Section 73, is the Chairperson, by virtue of the declaration under Section 74 of the Act. In the background of the above statutory provision, the stand of the petitioner that the State of A.P. has not granted the necessary permission/approval/sanction for regularizing the services of the respondents herein cannot be appreciated

If the Municipality is invested with certain statutory duties and obligations and is empowered by the statute to recruit appropriate number of personnel necessary to meet the statutory duties and obligations, in our view, the Municipality need not wait for the sanction or approval of the State Government unless the State Government decides to exercise such regulatory power vested in it under Section 73(3). No decision of the State Government restricting the Alwal Municipality in particular or any Municipality in general from exercising the power of recruiting the necessary personnel is brought to our notice. On the other hand, admittedly, the services of these 51 respondents are being utilized by the petitioner Municipality almost for a period of two decades continuously. So it cannot be said that there is no work to create posts for the absorption of the respondents. The inaction of the petitioner in not creating the posts notwithstanding the directions of the A.P. Administrative Tribunal and the High Court referred to earlier can neither be understood nor be justified if we believe that this country is governed by the rule of law.

Learned Counsel for the petitioner however argued that in R.P.No. 3031 of 1989 and also in the present O.A.NO 3606 of 2004 the respondents herein relied upon certain G.Os, which have no relevance to the relief sought by them. In fact the prayer in the present O.A. pending before the Administrative Tribunal is as follows:

"In view of the facts stated in Para-6 above, the applicants pray that this Hon'ble Tribunal may be pleased to declare the action of the respondents in not regularizing the services of the applicants as directed by the erstwhile Tribunal in R.P.No. 3031/89 dated 27.03.1989 and as per the orders of the Hon'ble High Court in W.P.No. 4966 of 1991 dated 04.08.1992 in terms of G.O.Ms.No. 1320, MA, dated 15.12.1981 and G.O.Ms.No. 300, MA, dated 24.06.1985 from the date of completion of 5 years of service by creating supernumerary

posts/regular posts in terms of G.O.Rt.1211, MA, dated 18.10.1989 and G.O.Ms.No. 1, MA, dated 01.01.1998 and pass such other order or orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case. "

The prayer is definite. The petitioners seek to justify the prayer on two grounds, basing on the earlier orders of the Tribunal and this Court referred to earlier and also certain G.O.No.1320, Municipal Administration dated 15.12.1981 and G.O.Ms.No.300, Municipal Administration dated 24.06.1985.

Copies of the above mentioned two G.Os are placed before us. We do agree that these G.Os may not provide basis for the relief sought for by the respondents. The fact that the prayer was not elegantly drafted does not detract from the rights of the respondents herein. Their right for regularisation flows from a judicial order, which attained finality. Accepting the submission of the petitioners would tantamount to permitting the petitioner to ignore the orders of this Court, which attained finality and went unchallenged for 12 long years, with impunity. A proposition which would be wholly inconsistent with the concept of constitutional government.

Alternatively the learned Counsel for the petitioner submitted that in view of the practice of employing people by various departments and also the various local and other authorities in the State of Andhra Pradesh indiscriminately without reference to the existence of any sanctioned posts or need to employ, the legislature of A.P. came forward with a legislation Act 2 of 1994 prohibiting such indiscriminate employment and therefore, in view of the enactment, the cases of the respondents could not be considered for regularization.

First of all it must be mentioned that the enactment referred to by the learned Counsel for the petitioner prohibited such employment from the date of its coming into effect i.e., 18.11.1993, by which date the respondents were working with the petitioner Municipality for a period of almost a decade. Apart from that the provisions of the above mentioned enactment, the Supreme Court, taking into consideration of the fact that large number of people were being employed by various departments of the State and local authorities prior to the date of commencement of the enactment, thought it fit to direct the State of A.P. to frame a scheme by which eligible and deserving people who had put in substantial number of years of service to regularize their service in their respective departments or the local authorities as the case may be. In

pursuance of the said direction, the Government of A.P. came up with a scheme empowered in G.O.Ms.No. 212 Finance and Planning dated 22.04.1994. In the said G.O. the Government decided that the services of such persons who worked continuously for a minimum period of five years and are continuing on 25.11.1993 be regularized by the appointing authorities, of course, subject to certain conditions. One of the conditions sought to be relied on by the learned Counsel for the petitioner in defence is condition No.1, incorporated in the said G.O, which reads as follows:

> "Absorption shall be against clear vacancies of posts considered necessary to be continued as per work load excluding the vacancies already notified to the APPSC/ DSC."

The petitioner seeks to take shelter under the said clause to say that there are no sanctioned posts/clear vacancies.

The existence of a vacancy is not a matter of absolute discretion of the employee in a case like the present one where admittedly the services of the 51 respondents are being extracted continuously for a period of two decades. It does not lie in the mouth of the petitioner to say that there is no clear vacancy of post. The creation of posts is exclusively within the hands of the Municipality as discussed earlier. The Municipality chose not to create the posts but extract the work from these respondents in an unregulated regime. It cannot be permitted to plead such a defence.

On the other hand, a close scrutiny of the clause indicates even the Government directed that an assessment of the need to continue the existing posts is required to be made while regularizing the service in terms of G.O.Ms.No. 212. Therefore, the whole basis of the scheme for regularization appears to be a proper assessment of the need, which in turn depends upon the work load which admittedly exists in the present case on the basis of the admitted facts.

In the alternative, the learned counsel for the petitioner also relied upon

G.O.Ms.No. 1, Municipal Administration dated 01.01.1998, a copy of which is placed before us. The said G.O. purports to sanction of 792 posts in 12 named Municipalities in the state of Andhra Pradesh and directed the Commissioner and Director of Municipal Administration to take necessary further action in the matter for fixing suitable work norm etc. The learned counsel for the petitioner argued that this is a G.O. issued in exercise of the power conferred on the Government under Section 73(3) of the Municipalities Act. He therefore argued that the silence of the Government in not sanctioning posts for the petitioner Municipality is required to be construed as a regulation imposed by the state Government under Section 73(3) on the petitioner Municipality. We see no basis to accept the submission. Section 73(3) of the Act is a limitation on the power of the Municipality to enter into contracts of employment. If the power under Section 73(3) is to be exercised by the State, such an exercise must be to an express order but not by silence. Hence, we reject the submission made by the learned counsel.

Learned counsel also relied on the judgment of State of **U.P. Vs. U.P. Madhyamik Shiksha Parishad Shramik Sangh**. In support of his submission he contends that that unless there exist a post, the judicial body is not justified in issuing directions for regularization the service of an employee, such as the respondents herein. In our view, this judgment cannot be pressed into service by the petitioner for the reason the decision of this court in writ petition No. 4966 of 1991 has attained finality. We also explained the circumstances under which the decision came to be rendered. If the petitioner for any reason believes such a decision is not in accordance with law laid down by the Supreme Court, the petitioner should have taken appropriate steps to have the decision reversed. Having accepted the decision for a period of more than a decade, it is not open for the petitioner to raise the objection that the directions given by this court are not in accordance with law.

Irrespective of the fact whether the earlier decision of this court is in conformity with the decision of the Supreme Court rendered in **U.P. Madhyamik Shiksha Parishad Shramik Sangh[2],** insofar as the parties to the litigation are concerned, the decision of this court is final. Lastly the learned counsel for the petitioner relied on the circular memo of Finance and Planning (FWPC. III) Dept dated 06.01.1998. The relevant portion of the memo reads as follows:

"All heads of Departments are informed that the instructions are clear that wherever the regularizations are to be made in respect of NMRs/Daily Wages/on Consolidated Pay in terms of G.O.Ms.No. 212, Finance, Dt: 22.04.94, the concurrence of the Government in Finance should be obtained before such regularization within the time limit given in the Departments or Heads of Ofices have no power to regularize the services of NMRs/Daily wages/on Consolidated Pay on their own. If the regularizations are not done withoutl the concurrence of the Government in Finance, the orders will not be acted upon. However the Departments can issue speaking orders rejecting the claims for regularisations, if the concerned candidate; has not fulfilled the conditions stipulated in the above G.O."

From the language of the circular, it is clear that such memo was directed only against the various departments of the Government and it is not intended to be a direction to the corporate bodies with a statutory powers and obligations. Apart from that, whether such a direction could be issued to the statutory authority fettering its discretion, barring in exercise of the power under Section 73(3) of the Municipalities Act is doubtful. At any rate the memo referred to above was issued much later than the decision of this Court in W.P.No. 4966 of 1991 dated 04.08.1992 and cannot have any retrospective effect. We therefore see no force in the submission of the learned counsel for the petitioner. The writ petition is devoid of merits and therefore dismissed at the admission stage.

After the order pronounced, the learned counsel for the petitioner prayed that some reasonable time be granted to the petitioner to comply with the interim directions granted earlier by the Administrative Tribunal. He also stated that a categorical statement is made in the counter filed by the petitioner herein before the Tribunal in the above mentioned O.A. that the petitioner is willing to comply with the earlier orders of this Court and the Tribunal and awaiting approval of the State which the petitioner believes to be necessary. We do not see any such necessity in law. In the circumstances, the petitioner is granted time for a period of four weeks for complying with the interim orders made by the Administrative Tribunal.

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J. CHELAMESWAR, J

Dt: 14.12.2005.

RAMESH RANGANATHAN, J

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